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IN THE
COURT OF APPEALS OF INDIANA

TODD ANTHONY BEBOUT,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 02A03-0702-CR-70
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Frances C. Gull, Judge
Cause No. 02D04-0503-FB-31

July 13, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Todd Bebout appeals his sentence following his convictions for Operating a Vehicle with a Blood Alcohol Content of Over .15 Causing Death, a Class B felony; Operating a Vehicle with a Controlled Substance or its Metabolite in the Blood Causing Death, a Class B felony; Operating a Vehicle While Intoxicated Causing Serious Bodily Injury, as a Class D felony; and being an habitual offender. He presents a single issue for our review, namely, whether his sentence is inappropriate in light of the nature of the offenses and his character.

We affirm.

FACTS AND PROCEDURAL HISTORY

On March 15, 2005, Bebout consumed alcohol, marijuana, and cocaine and then drove his car in Fort Wayne. At some point, Bebout disregarded a traffic light and struck a van being driven by Lori Wirick and in which Carol Waddell was a front seat passenger. As a result of that collision, Waddell died, and Wirick sustained injuries.

The State charged Bebout with fourteen counts of criminal conduct related to the incident, including ten felonies. Bebout ultimately pleaded guilty to operating a vehicle with a blood alcohol content of over .15 causing death, a Class B felony; operating a vehicle with a controlled substance or its metabolite in the blood causing death, a Class B felony; operating a vehicle while intoxicated causing serious bodily injury, as a Class D felony; and being an habitual offender. The plea agreement left sentencing open to the trial court's discretion, but required that the sentences for the first two counts would run concurrently.

At sentencing, the trial court identified the following aggravating circumstances:

> (a) Defendant has a multi-county and lengthy criminal record consisting of four (4) misdemeanor convictions and two (2) felony convictions as follows: 1986 Operating While Intoxicated, Allen County; 1991 Operating While Intoxicated, Allen County; 1996 Public Intoxication, Steuben County; 2000 Possession of Cocaine, Allen County; 2001 Public Intoxication, Steuben County; 2001 Battery By Body Waste, Allen County.
>
> (b) Prior efforts at rehabilitation have failed as Defendant has been on probation three times (1991, 1996, and 2000), probation has been revoked once on the Cocaine conviction (2001). Before the revocation, defendant was given an intermediate sentence of sixty (60) days in jail and then returned to probation. Defendant has been given fines, lesser jail sentences, lengthier jail sentences, probation, suspended DOC commitments, executed commitments to the DOC, the benefit of Alcohol Countermeasures Program, and treatment at the Washington House. All but one of Defendant's convictions are related to alcohol or controlled substances and have escalated in frequency and severity, culminating in the instant charges committed three (3) years from Defendant's discharge from the DOC. The Court is unable to identify additional rehabilitative measures that would be successful with this Defendant.
>
> (c) The victim of Counts 1 and 2 was over the age of sixty-five (65) as stated in the Affidavit for Probable Cause, attached to the Pre-Sentence Investigation Report, which lists the victim's date of birth being June 22, 1937. The Defendant admitted in open Court the accuracy of the contents of the PSI.

Appellant's App. at 62-63. And the trial court identified the following mitigating circumstances: Bebout's guilty plea and acceptance of responsibility for his conduct; and his expression of remorse and apologies to the surviving victim and family of the deceased victim. The trial court expressly declined to find mitigating Bebout's "bare allegation that his drug addiction and alcoholism are a disease, finding the allegation unsupported." Id. at 63.

The trial court did not impose any sentence on the first count, but merged that sentence with a twenty-year sentence on the second count, enhanced by thirty years for

the habitual offender adjudication. The trial court also imposed a consecutive three-year sentence on the Class D felony conviction, for a total aggregate sentence of fifty-three years. This appeal ensued.

DISCUSSION AND DECISION

Although a trial court may have acted within its lawful discretion in determining a sentence, Article VII, Sections 4 and 6 of the Indiana Constitution "authorize[] independent appellate review and revision of a sentence imposed by the trial court." Anglemyer v. State, No. 43S05-0606-CR-230, ___ N.E.2d ___, slip op. at 11 (Ind. June 26, 2007) (quoting Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006)). This appellate authority is implemented through Indiana Appellate Rule 7(B). Id. Under Appellate Rule 7(B), we assess the trial court's recognition or non-recognition of aggravators and mitigators as an initial guide to determining whether the sentence imposed was inappropriate. Gibson, 856 N.E.2d at 142 (Ind. Ct. App. 2006). However, "a defendant must persuade the appellate court that his or her sentence has met th[e] inappropriateness standard of review." Anglemyer, ___ N.E.2d at ___, slip op. at 15 (quoting Childress, 848 N.E.2d at 1080) (alteration in original).

In Anglemyer, our Supreme Court also reiterated that whether the trial court imposed a sentence in abuse of its discretion is a question distinct from whether that sentence is inappropriate under Indiana Appellate Rule 7(B). See Anglemyer, slip op. at 9. Here, the trial court entered a sentencing statement that included a reasonably detailed recitation of its reasons for imposing Bebout's sentence, and those reasons are both

supported by the record and not improper as a matter of law. See id. at 11. As such, our review is limited to Bebout's claim under Indiana Appellate Rule 7(B).

Bebout contends that the trial court relied on improper aggravators, failed to identify his mental illness as a mitigator, and abused its discretion when it denied his motion to continue the sentencing hearing. As a result, Bebout maintains that his sentence is inappropriate in light of the nature of the offenses and his character. We address each contention in turn.

Bebout first contends that the trial court erred when it identified as an aggravator the fact that prior efforts at Bebout's rehabilitation have failed. In support of that contention, he cites to our Supreme Court's opinion in Morgan v. State, 829 N.E.2d 12 (Ind. 2005). In Morgan, the court held that under Blakely, a trial court cannot identify as a separate aggravator that prior efforts at rehabilitation have failed. Id. at 17. However, here, in his plea agreement, Bebout expressly waived his Blakely rights. As such, Morgan is inapposite, and we hold that the trial court did not err in identifying this aggravator. See Armstrong v. State, 742 N.E.2d 972, 981 (Ind. Ct. App. 2001) (holding trial court properly identified need for additional correctional treatment where court articulated that prior unsuccessful attempts at rehabilitation through prison and probation.)[1]

Bebout next contends that because the nature of his prior criminal convictions "are not significant aggravators for his present offenses[,]" the trial court erred when it identified his criminal history as an aggravator. Brief of Appellant at 10. We cannot

[1] Bebout does not make any contention that the trial court failed to sufficiently articulate the basis for that challenged aggravator.

agree. As the trial court stated, "[a]ll but one of [Bebout's] convictions are related to alcohol or controlled substances and have escalated in frequency and severity[.]" Appellant's App. at 63. Bebout's assertion on this issue is without merit.

Bebout also maintains that the trial court erred when it did not identify as mitigating his diagnosis of "anxiety." Brief of Appellant at 10. But Bebout did not proffer his alleged mental illness as a mitigator to the trial court, so the issue is waived. See Bryant v. State, 802 N.E.2d 486, 501 (Ind. Ct. App. 2004), trans. denied. Moreover, Bebout does not direct us to any evidence showing that his mental illness is significant enough to be considered mitigating. The trial court did not err when it did not identify Bebout's anxiety as a mitigating circumstance.

Finally, at sentencing, Bebout asked for a continuance of his sentencing hearing because his family was not in attendance. On appeal, he contends that he was "prejudiced by not allowing his family to speak on his behalf at sentencing." Brief of Appellant at 11. The decision whether to grant a continuance, when the motion is not based upon statutory grounds, lies within the discretion of the trial court and will not be reversed absent a clear showing of an abuse of discretion. Evans v. State, 855 N.E.2d 378, 386 (Ind. Ct. App. 2006), trans. denied. The appellant must overcome a strong presumption that the trial court properly exercised its discretion. Id. Additionally, the defendant must make a specific showing of how he was prejudiced as a result of the trial court's denial of his motion. Id. at 386-87.

Bebout has not made a specific showing of how he was prejudiced as a result of the trial court's denial of his motion to continue the sentencing hearing. He does not

explain what his family members might have said that might have affected the sentence imposed. Further, he admitted that none of his family members had even contacted him following the guilty plea hearing to inquire as to the date of his sentencing hearing. As such, Bebout cannot show that any of his family members had planned to attend the sentencing hearing. The trial court did not abuse its discretion when it denied Bebout's motion to continue the hearing.

In sum, because Bebout's conduct resulted in injury to one victim and the death of another, we cannot say that the nature of the offenses supports a lesser sentence. Moreover, Bebout's criminal history shows a consistent pattern of substance abuse and a failure to respond to prior attempts at rehabilitation. Bebout has not demonstrated that his sentence is inappropriate in light of the nature of the offenses and his character.

Affirmed.

RILEY, J., and BARNES, J., concur.